

IN THE

United States Circuit Court
of Appeals

FOR THE

NINTH CIRCUIT

BROADWAY TOWEL SUPPLY
COMPANY, a corporation, and
AMOS BURG,

Appellants,

vs.

BROWN-MEYER COMPANY, a
corporation,

Appellee.

Appeal from the District Court of the United States.
for the District of Oregon.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

INFORMALITY OF APPELLANTS' BRIEF.

In this case it appears that the Assignment of Errors on behalf of the appellants fails to comply with the requirements of Rule 11 of this Court, and motion to dismiss upon that ground will be presented under provisions of Rule 21.

It also appears that no Brief, conformable to the requirements of **Rule 24** of this Court, has been filed, and motion to dismiss upon that ground will also be presented.

It further appearing that certain matters not in evidence here have been included in the Transcript, and also that certain copies of patents not embraced within the certified Transcript, have been served upon counsel for Appellee, presumably with the purpose of attempting to present them before this Court in argument in this appeal, motion will be presented to strike from the record, and to disregard such matters, or so many of them as this Honorable Court may deem proper to exclude.

In view of the failure of the Appellants to present in their Brief (a) a concise abstract or statement of the case, or (b) a specification of the errors relied upon, or (c) a Brief of the argument in proper form, all as prescribed by **Rule 24** aforesaid, it appears that Appellee's Brief should, in accordance with **Sec. 3** of the Rule, present, at the outset, a statement of the case, in which view the following is submitted:

STATEMENT OF THE CASE.

This is an appeal from decision and decree in favor of Plaintiff in a suit brought in the United States District Court, for the District of Oregon, by **Brown-Meyer Company**, hereinafter, in respect to its relationship fixed in the Trial Court, designated Plaintiff, against **Broadway Towel Supply Company**, a corporation, and **Amos Burg**, in like manner designated Defendants, for the

infringement of U. S. Letters Patent No. 1,115,895, granted to Brown-Meyer Company, as assignee of Charles F. Brown, under date of November 3, 1914, upon application filed by said Brown, on August 13, 1913, for Improvements in Towel Holders. The device in suit, as indicated in the patent, is "one for holding and preserving in order an assemblage of clean towels that are carried in such a manner as to keep them clean, folded and smooth as they come from the laundry, until such time as they are required, one by one, for use." Provision is also made for conveniently withdrawing the towels, one by one from the pile, for facilitating the manipulation of each while in use, and for securing them against accidental misplacement or intentional and unauthorized removal after use.

ANSWER ADMITS VALIDITY OF THE PATENT.

To the Bill of Complaint, Defendants made Answer in usual form, admitting the validity of the patent. ,

PRIOR STATE OF THE ART.

Answer sets up the prior state of the art to be that shown in Letters Patent of the United States as follows:

N. S. Baldwin and E. S. Goodwin, Number 557,754, date Apr. 7, 1896.

J. G. Cooner, Number 908,076, date Dec. 29, 1908.
J. Rouso, Number 42,398, Des., date Apr. 9, 1912.
L. Straub, Number 1,038,984, date Sept. 17, 1912.
T. K. Taylor, Number 1,052,292, date Feb. 4, 1913.
G. Reid, Number 1,067,622, date July 15, 1913.

T. Heins and E. R. Galland, Number 1,078,501,
date Nov. 11, 1913.

At the trial Defendants introduced in evidence copy of the File Wrapper and Contents of the patent in suit (Transcript, pp. 105-121), and copies (not placed in printed Transcript, see Transcript, p. 102) of the patents set up in the answer, all of which were considered by the Patent Office in the examination of the application.

At the trial, also, particular stress was laid on the Reil patent, No. 1,067,622, Defendants' Exhibit 7 (not paged in Transcript). The differences between the Reid device and that in suit are radical and obvious to one skilled in the art and acquainted with both. The Patent Office considered, along with others set up in the answer, this patent in particular, and decided that the Reid patent, as well as the others, was not an anticipation of the patent in suit. To the allowance of the patent in suit over the Reid patent, attention of counsel for Defendants was pointedly directed by the Court at the trial, and in response to the Court's reference thereto, Defendants' counsel says, "and in that (action) the Patent Office, we will say, was correct" (see Transcript, pp. 22-23).

INFRINGEMENT ADMITTED.

Said Answer furthermore admits (Transcript, p.

11) Defendants' infringement of said patent from the date thereof to about November 30, 1914.

The fact of such infringement is also expressly admitted by counsel for Defendants in answer to question put by the Court (Transcript, p. 15).

CHANGE ALLEGED TO AVOID INFRINGEMENT.

At the time last named, counsel alleged on behalf of Defendants, that they made a change in their device by which he claims they avoided infringement. The language employed by Defendants' counsel in referring to the alleged change is significant in that it admits continued use of the same device. In reply to the question put by the Court, "You are not using it, or have you changed it?" Defendants' counsel replies, "We have changed it, your Honor." (Transcript, p. 15.)

In respect to the alleged change aforesaid, in Defendants' device, admitted before such alleged change to have been an infringement of the patent in suit (Transcript, p. 15), and to have been made about Dec. 1, 1914, W. C. H. Smith, Defendants' witness, who says (Transcript, p. 28) he is one of the "partners" of the Broadway Towel Supply Company as he was in July, 1914, testifies, that when Defendants were required, by ordinance passed by the Council of the City of Portland, July 29, 1914, No. 29270 (set forth in Transcript, p. 33) to use a sanitary device, "The one I installed was the one they (Plaintiff had been using before I put ours in" (Transcript, p. 32).

CHANGE ALLEGED IS MERE CHANGE OF USE. INFRINGING DEVICE UNCHANGED.

The change referred to, made about Dec. 1, 1914 (Transcript, p. 31), was no change in the device at all. It consisted, according to Defendants' witness, merely in temporarily disengaging the end of the chain from the lock and putting that to the end of the basket. (See next to last paragraph, p. 31, Transcript.) The structure continued to be identical with that admitted in the Answer to be an infringement. Defendants persisted in using the same device until restrained by injunction.

COURT HOLDS INFRINGING DEVICE UNCHANGED.

His Honor, Judge Wolverton, decides (Transcript, p. 45): "The defendants are using a device in practically all respects, as to construction and operation, the same as Plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling members, as does the Plaintiff's contrivance," and that "Defendants are infringing." In reference to alleged change in Defendants' device (Transcript, p. 47) the Court says: "I am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement."

INTERLOCUTORY DECREE.

Upon the decision aforesaid "Interlocutory Decree

for injunction and accounting" (Transcript, pp. 47-50) was entered.

MOTION FOR NEW TRIAL.

Thereupon Defendants presented "Petition for leave to file supplemental answer and take proofs thereon" (Transcript, pp. 51-56), accompanied by "Proposed Supplemental Answer" (Transcript, pp. 57-60).

In the said petition (Transcript, pp. 52-53) and in the Proposed Supplemental Answer (Transcript, p. 58), reference was made by way of proposed defense to an alleged patent to one Jacques Roussio, which was alleged to have issued October 19, 1915, *a date subsequent to that of the patent in suit and antecedent to the date of trial* by several weeks.

Reference was therein also made to an alleged application by one Henry A. Ammann, not even alleged then to have gone to patent, and which for that reason, if for no other, would be wholly immaterial.

PETITION DENIED.

The said petition was, on April 17, 1916, by Judge Wolverton "in all respects overruled and denied" (Transcript, p. 61).

PROCEEDINGS BEFORE MASTER.

Thereupon, an accounting before a Special Master,

John B. Cleland, Esq., was had, and award made by him of \$335.00 with costs and disbursements, and a recommendation to the Court to award triple damages (Transcript, p. 67).

A stipulated condensed statement of part of the testimony taken before the Master appears in the Transcript, pp. 68-85, inclusive.

It shows that Defendants ceased not even before the Master in their efforts to secure consideration of the alleged Rousso patent, which had been previously denied consideration by the Court, pressing them even to the extent of demanding that the Master review the decision of the District Court (Transcript, p. 63). Counsel for Plaintiff objected to the introduction of the alleged patent, and the objection was sustained by the Master (Transcript, p. 84).

EXCEPTIONS TO MASTER'S REPORT.

Exceptions to "Master's Report" (Transcript, pp. 86-91) were filed on behalf of Defendants, in effect as follows:

I.

(a) To the amount of the award made by the Master (Transcript, p. 86).

(b) To the award as being unsupported by the evidence (Transcript, pp. 86-87).

(c) To the award as being excessive (Transcript, pp. 88-89).

(d) To the award on the ground that the Master should have taken into account the alleged Rousso patent (Transcript, p. 89).

II.

To the recommendation of the Master to the Court to award triple damages (Transcript, pp. 89-90).

III.

To any award by the Master of other than nominal damages (Transcript, p. 90).

EXCEPTIONS I AND III OVERRULED.

EXCEPTION II SUSTAINED.

The Court overruled Exceptions I and III and sustained Exception II, thereby denying triple damages (Transcript, p. 91).

FINAL DECREE.

Final Decree was entered Jan. 22, 1917 (Transcript, p. 92), and thereupon this appeal was taken (Transcript, pp. 92-93).

ASSIGNMENTS OF ERROR, ARGUMENT.

In anticipation of the possibility that this Honorable Court may determine, upon hearing of motion, that Appellants are entitled to be heard upon some one or more of their Assignments of Error presented, attempt is hereinafter made to arrive at an understanding of their apparent or possible meaning and to make herein reply thereto.

Proceeding accordingly, the several Assignments will be set down, *seriatim*, each under its respective numeral, with argument following.

I.

“In finding that the towel rack used by defendants from and after December 1, 1914, to date of trial of this cause was not substantially different from the device claimed in the patent in suit, and that defendants’ said device is an infringement of the device claimed in the patent in suit.” (Transcript, p. 96.)

This appears to assign as error, first, the finding of the District Court that Appellants’ device used after Dec. 1, 1914, was not substantially different from that defined in the claims of the patent in suit.

Second: That their said device infringes.

Identity of Appellants’ device prior to Dec. 1, 1914, is admitted in the Answer (Transcript, p. 11), as well as in response to inquiry made by His Honor, Judge Wolverton (Transcript, p. 15). Furthermore, identity is, in effect, admitted after Dec. 1, 1914 (Transcript, p. 29, next to last paragraph).

It is the finding of fact by the Court that there was no material change made in said device (Transcript, pp. 45-47), to which Assignment of Error is, it is assumed, directed.

Findings of Trial Court presumptively correct, and will not be reversed if not unreasonable in themselves or not clearly

in conflict with the preponderance of evidence.

See *Warren vs. Burt*, 58 Fed. 101 (C. C. A.) and authorities noted thereunder.

Latta vs. Granger, 68 Fed. 69 (C. C. A.).

II.

“In giving to the claims of the patent in suit a broader interpretation than warranted on the face thereof, or permitted by the prior state of the art.” (Transcript, p. 96.)

No reference is made to Transcript. Appellee denies that the District Court gave any interpretation to the claims of the patent, other than that allowed to them by the admission of infringement by Defendants below (Transcript, p. 11).

The Court simply held (Transcript, p. 29) that there was no change made by Defendants in the device which they admitted to be an infringement. Therefore interpretation of the claims was unnecessary.

III.

“In finding that the device used by the defendants from December 1, 1914, is an infringement of the invention claimed in the patent in suit, because such finding is contrary to the principle and spirit of the patented invention in question, and also contrary to the law governing patents for combinations.” (Transcript, p. 96.)

No error assigned. Court below simply holds that an admitted infringement was continued.

IV.

"In finding that the device used by defendants from December 1, 1914, although merely an obvious modification of the patented invention of Reid, of record, which is prior to the patent in suit, nevertheless is an infringement of the patent in suit, for such finding disregards the rights vested in the general public prior to the issuance of the patent in suit." (Transcript, p. 97.)

Finding of Court respecting Reid patent sustains decision of the patent office and view of Appellants' counsel (Transcript, p. 23), and accords with admission in the Answer of validity of patent in suit.

Finding of Court not ordinarily disturbed on appeal.

Vide supra, citations under Assignment I.

V.

"In finding that in order for the Court to hold that the device used by defendants from December 1, 1914, is not an infringement of the device claimed in the patent in suit, because substantially like the prior Reid patent of record, it must appear that the said defendants' device had added to it a new element or discovery, and without such defendants' device is merely colorable, and without such patentable variation as will avoid infringement." (Transcript, p. 97.)

Same objection as to Assignment IV.

Also assignment predicated on reasons given by Court for decision improper and unavailing.

Clark vs. Deere and Mansur Co., 80 Fed.
534 (C. C. A.).

VI.

“In finding that there was substantial identity between the device claimed, and secured, by the patent in suit and the device used by defendants from December 1, 1914, with respect (first) to the result attained, (second) the means of attaining that result, and (third) the manner in which the different parts operate and co-operate to produce that result; and in not finding that there was a substantial difference in said two devices in these respects.” (Transcript, p. 97.)

A repetition of Assignments V and VI under different form. Same objections.

VII.

“In the entry of the interlocutory decree in this cause, because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 98.)

Injunction not reviewed unless abuse manifest.

Workingmen's Amalgamated Council vs.
United States, 57 Fed. 85 (C. C. A.).
Thompson vs. Nelson, 71 Fed. 339.

VIII.

"In denying the petition of defendants for relief to file, under equity rule 34, a supplemental answer alleging material facts of which they were ignorant at the time of their original answer, to-wit: Setting forth patents of the United States *granted for inventions prior to that of the patentee in suit*, and bearing directly on the invention claimed in the latter patent with respect to the validity and scope thereof, and also bearing on the obligation of defendants under the patents of said prior inventors, which obligations defendants desired to be taken into account on their accounting herein." (Transcript, p. 98.)

Statement in italics is false.

Denial of new trial will not be reviewed.

Henderson vs. Moore, 9 U. S. (5 Cranch)
11.

"This Court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error."

The Marine Ins. Co. vs. Hodgson, 10
U. S. (6 Cranch) 206.

IX.

“In the entry of the supplemental interlocutory decree because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 98.)

Evidently a mistake. Omitted from brief. (Appellants' Brief, p. 24.)

X.

“In the refusal to vacate said supplemental decree.” (Transcript, p. 98.)

Evidently a mistake. Omitted from brief. (Appellants' Brief, p. 24.)

XI.

“In overruling the defendants' exception I to the report of the Master on accounting.” (Transcript, p. 98.)

XII.

“In overruling the defendants' exception III to the report of the Master on accounting.” (Transcript, p. 98.)

XIII.

“In affirming the report of the Master, awarding the sum of \$335 against the defendants because such award is excessive, not supported by, and contrary to the facts of the case.” (Transcript, p. 99.)

XIV.

“In awarding any other than a nominal sum against defendants, because the evidence does not show what, if any, actual damages the plaintiff sustained by any alleged infringement.” (Transcript, p. 99.)

XV.

“In the entry of the final decree in this cause because in prejudice of the substantial rights and equities of the defendants in the premises.” (Transcript, p. 99.)

Assignments of Error XI, XII, XIII, XIV and XV if, upon determination of motion to dismiss, they be held to be good in form, appear to be to the findings of the Court and to the Master's findings.

It is well established that such findings when adopted by the Court are *prima facie* correct. Burden is on objecting party.

Metsker vs. Bonebrake, 10 U. S. 66.

Tighlman vs. Proctor, 125 U. S. 136.

Crawford vs. Neal, 1444 U. S. 585.

Furrer vs. Ferris, 145 U. S. 132.

Note particularly Warren vs. Keep, 155 U. S. 265, touching finding of damages in patent cause.

Brown Bag Filling Mach. Co. vs. Drohen, 175 Fed. 576 (C. C. A.).

Brown vs. Lanyon Zinc Co., 179 Fed. 309
(C. C. A.).

Luten vs. Sharp *et al*, 234 Fed. 880.

In submitting the foregoing, counsel for Appellee asks leave of the Court to file a supplemental brief, if, hearing being allowed by the Court, he should deem it advisable so to do.

Respectfully submitted,

JOSEPH L. ATKINS,

Of Counsel for Appellee.

